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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States is liable under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, as a "private individual under like circumstances" for the allegedly negligent enforcement of the Mine Safety Act by inspectors of the Mine Enforcement and Safety Administration (MESA).

2. Whether a suit arising out of a MESA inspector's allegedly negligent enforcement of the Mine Safety Act is barred as a claim based upon the performance of a "discretionary function" within the meaning of 28 U.S.C. 2680(a).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 715 F.2d 1206. The opinion of the district court (App., *infra*, 30a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1983 (App., *infra*, 28a-29a). A petition for rehearing was denied on December 7, 1983 (App., *infra*, 26a-27a). On February 22, 1984, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1346(b) provides, in pertinent part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury * * * or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

28 U.S.C. 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT

1. Under the Federal Metal and Nonmetallic Mine Safety Act of 1966 (Mine Safety Act), Pub. L. No. 89-577, 80 Stat. 772 *et seq.*,[1] the Secretary of the Inter-

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[1] The Mine Safety Act was repealed in 1977 and replaced by the Federal Mine Safety and Health Act of 1977 (1977 Act), Pub. L. No. 95-164, 91 Stat. 1290, codified at 30 U.S.C. 801 *et seq.*, which became effective 120 days after November 9, 1977,

rior was authorized to issue "mandatory standards" concerning "conditions or practices of a kind which could reasonably be expected to cause death or serious physical harm" to mine workers, Pub. L. No. 89-577, § 6(b), 80 Stat. 774. The "mandatory standards" relevant to this case were set forth in 30 C.F.R. Pt. 55 (1976) and were enforced by the Federal Mine Enforcement and Safety Administration (MESA) under the authority of the Secretary. MESA was also empowered to inspect and investigate mines covered by the Mine Safety Act. Section 8, 80 Stat. 775. See *Donovan* v. *Dewey*, 452 U.S. 594, 596 (1981).

If a MESA inspector discovered a condition that "could reasonably be expected to cause death or serious physical harm immediately," the inspector was authorized to order the immediate withdrawal of persons endangered by the condition. Section 8(a), 80 Stat. 775. If an inspection revealed a failure to comply with a mandatory standard that did not create "a danger that could reasonably be expected to cause death or serious physical harm * * * immediately," the MESA inspector was empowered to issue a notice requiring abatement

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the date of the 1977 Act's passage. Section 307, 91 Stat. 1322. Since the accident that gave rise to this lawsuit took place on September 1, 1977, this case technically involves the Mine Safety Act. The 1977 Act, however, preserved many of the features of the Mine Safety Act, including the duty (now imposed on the Mine Safety and Health Administration, under the supervision of the Secretary of Labor) to issue regulations and make inspections and investigations for the purpose of enforcing the Act. See 30 U.S.C. 811, 813. The 1977 Act also provided that the regulations issued under the Mine Safety Act "shall remain in effect as mandatory health or safety standards." Section 301(b)(1), 91 Stat. 1317. The regulations involved in this case are still in effect. 30 C.F.R. Pt. 55.

of the condition within a specified reasonable time. Section 8(b), 80 Stat. 776. Notwithstanding MESA's authority, however, the mine owner at all times retained "the primary responsibility to prevent the existence of [unhealthy and unsafe] conditions and practices in such mines." 30 U.S.C. (1976 ed.) 801(e).

Acting pursuant to this statutory authority, MESA inspectors on February 10 and 11, 1977, inspected a clay mine owned by the Ristokrat Clay Products Company, an Illinois corporation that mined clay for the manufacture of bricks (App., *infra*, 3a). Ristokrat's mine used an open conveyor belt, which carried clay first to a grinding area and then to dust bins in a separate room (*id.* at 24a). Along each side of the belt was a narrow walkway, which the employees used to enter the mine or the dust bin room. On the east wall of this passageway was an electrical junction box that was in a damaged condition. The cover of the box could not be closed and the wires entering the box were not adequately insulated at the point where the conductors entered the box. *Id.* at 2a-3a. It is not clear from the record how long the junction box had existed in this defective condition (*id.* at 39a). It is undisputed, however, that the box was in violation of mandatory standards established by the Secretary under the Mine Safety Act (*id.* at 3a n.1).

During the February 1977 inspection, MESA inspectors noticed that mine employees customarily walked along the west side of the conveyor belt and then crossed the belt in order to get to the dust bins located on the east side of the belt. Apparently, employees preferred to walk along the west side of the belt because the east side walkway was partially obstructed

by chutes. App., *infra*, 4a-5a. Noting the unguarded condition of the belt, the inspectors cited the mine owner for a violation of 30 C.F.R. Pt. 55.9-7, the mandatory standard requiring that all unguarded conveyor belts be equipped with emergency stop devices (App., *infra*, 3a-4a & n.2). Because the continuous processing of the clay into dust made it impractical to install stop devices on the belt, the inspectors permitted the mine owner to abate the Notice of Violation by the construction of two-by-four handrails along both sides of the belt (*id.* at 21a). No Notice of Violation was issued for the defective junction box (*id.* at 33a).

The construction of the handrails narrowed the walkway along both sides of the belt and ended the employees' practice of walking along the west side of the conveyor system and crossing over the belt to get to the dust bin on the east side. The handrails also reduced by four inches the passageway adjacent to the electrical junction box, resulting in a clearance between the junction box and the rail of approximately 14 inches. App., *infra*, 2a, 4a-5a. On September 1, 1977, respondent's husband, while walking along the east side of the belt, came into contact with the defective junction box and was electrocuted (*id.* at 2a).

2. Respondent filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the Northern District of Illinois, claiming that the MESA inspectors had been negligent in failing to observe and cite for correction the defective electrical junction box (App., *infra*, 5a). Alternatively, respondent claimed that, in requiring the construction of the handrails, the MESA inspectors had negligently "created or increased

the risk of injury from the defective junction box" (*ibid.*).

After a trial limited to the issue of liability, the district court entered judgment for the government (App., *infra*, 30a-40a). The court held that the mine owner's negligence in allowing the defective junction box to remain unrepaired was the proximate cause of the death of respondent's husband (*id.* at 38a-39a). The court concluded that "the cause of the injury was entirely the result of a defective electrical junction box that was in that wall and not seen by anybody, including Donald Hylin's fellow employees" (*id.* at 39a).

The court of appeals reversed (App., *infra*, 1a-25a). Before considering the district court's finding on proximate causation, the court of appeals rejected the government's alternative grounds for affirming the judgment that were based directly on the Federal Tort Claims Act. First, the court of appeals held that even though respondent's claim arose out of MESA's regulatory responsibilities, which involve a "uniquely governmental" function, the private person limitation in 28 U.S.C. 1346(b) and 2674 did not bar recovery (App., *infra*, 6a-7a). Instead, the court held that the United States could be liable as a "private individual under like circumstances" under the good samaritan doctrine of Illinois law embodied in the Restatement (Second) of Torts §324A (1965) (App., *infra*, 7a-8a).[2]

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[2] Section 324A of the Restatement (Second) of Torts (1965) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm

The court of appeals remarked that respondent's first theory of liability under the Restatement—negligent failure to inspect—was "more troubling" (App., *infra*, 8a). The court concluded that it did not have to address that issue, however, because Illinois "would permit a finding of negligence here under [respondent's] second theory of liability—the increase in risk of injury created by the MESA inspectors' effectively non-optional instruction to build a handrail which had * * * the foreseeable effect of diverting worker ingress to the dust bin past the dangerous junction box through a passageway which was further narrowed by the erection of the handrail" (*id.* at 7a).

The court of appeals also rejected the government's contention that respondent's claim was barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). Relying on the Ninth Circuit's decision in *United Scottish Insurance* v. *United States*, 692 F.2d 1209, 1212 (1982), cert. granted, No. 82-1350 (May 16, 1983), the court reasoned that the issuance of a Notice of Violation requiring the erection of the handrail was compelled by the MESA regulations and therefore did not involve " 'policy judgment and decision' " (App., *infra*, 14a, quoting *Dalehite* v. *United States*, 346 U.S. 15, 35-36 (1953)).

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resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Finally, the court of appeals held that the district court's finding that the inspectors' negligence was not the proximate cause of the injury was "clearly erroneous" (App., *infra*, 16a-23a). The court of appeals noted that under state law more than one act of negligence may be the proximate cause of injury. Thus, the fact that Ristokrat's failure to repair the junction box "was 'closer' to the injury" (*id.* at 22a) did not preclude a finding of liability for the antecedent negligence of the inspectors, so long as the ultimate injury was still probable and foreseeable. On that issue, the court of appeals concluded that an inspector "left the mine knowing that the handrail would be installed and consequently that the workers would be forced to pass closely by the junction box whose dangerous and defective condition the inspectors observed" (*id.* at 23a).[3]

Judge Bauer dissented (App., *infra*, 24a-25a). Noting that the majority had found respondent's first theory of liability to be "troublesome," Judge Bauer found respondent's second theory of liability to be indistinguishable, stating (*id.* at 24a):

> The risk, if any, that rose from the inspector's order that handrails be installed was not inherent in the handrails. Rather, the risk was that by re-

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[3] The court of appeals stated that the inspectors "observed [the junction box] and saw its dangerous condition" (App., *infra*, 3a; see also *id.* at 21a). However, the court did not cite any evidence to support this assertion, which is directly contrary to the findings of the district court (see *id.* at 39a). See page 6, *supra*. In fact, the court of appeals' statement is not supported by anything in the record; there is no evidence that the inspectors either examined or were cognizant of the condition of the box at the time they issued the Notice of Violation with regard to the conveyor belt.

ducing the free access past the junction box by four inches there was an increased probability that a worker would make physical contact with the defective junction box. And this risk, the risk of physical contact with the junction box, could only have been avoided by inspection and correction of the junction box itself.

REASONS FOR GRANTING THE PETITION

This case presents important questions of the government's liability under the Federal Tort Claims Act that are essentially identical to those pending in *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig*), cert. granted, No. 82-1349 (May 16, 1983), and *United States* v. *United Scottish Insurance*, cert. granted, No. 82-1350 (May 16, 1983).[4] Accordingly, this Court's decision in those cases is likely to have a substantial effect on the validity of the court of appeals' decision in this case. The Court therefore may wish to hold this Petition pending its decision in those cases.[5]

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[4] The only factual difference between this case and *Varig* and *United Scottish* is that here the inspectors ordered a modification that created an unforeseen hazard that was not ordered abated by the inspectors, whereas, in the other cases, the inspectors simply failed to discover any defect. This case, however, is not like *Arney* v. *United States*, 479 F.2d 653 (9th Cir. 1973), where the inspector ordered a fuel line modified in a way that caused it to become dangerous. The handrails that were installed pursuant to the Notice of Violation were not inherently dangerous and did not by themselves cause any injury. Thus, as Judge Bauer correctly concluded, there is no difference "between 'mere negligent failure to inspect the junction box and order correction' * * * and * * * mere negligent failure to inspect the junction box in conjunction with its environs and order correction" (App., *infra*, 25a (citation omitted)).

[5] A copy of our brief in *Varig* and *United Scottish* is being sent to counsel for respondent.

At issue in *Varig* and *United Scottish* is the liability of the United States under the Federal Tort Claims Act for the alleged negligence of the Federal Aviation Administration (FAA) in issuing type certificates for airplanes that subsequently crashed. In our brief in those cases, we argue that the private person limitation in the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, indicates that Congress did "not waive sovereign immunity in situations where there is no liability for private individuals 'even remotely analogous to that which [plaintiffs] are asserting against the United States.'" (U.S. Br. 23, quoting *Feres* v. *United States*, 340 U.S. 135, 141 (1950)). Our statement there is equally applicable here: "The actions of a government agency in enforcing health and safety legislation pursuant to a program of inspection and certification have no counterpart in the private sector" (U.S. Br. 25). Thus, respondent's attempt to impose liability on the United States for the alleged negligence of MESA inspectors performing law enforcement functions is impermissible under Sections 1346(b) and 2674.

With regard to the good samaritan doctrine, we argue in *Varig* and *United Scottish* (U.S. Br. 29-34) that the doctrine is not satisfied in cases involving federal regulatory agencies that merely oversee private industry's efforts to comply with mandatory health or safety standards, because such federal agencies do not "render services to another * * * necessary for the protection of a third person," as required by Section 324A of the Restatement (Second) of Torts (1965). Neither the FAA in *Varig* and *United Scottish* nor MESA in this case purported "to render a *direct* service to the person who was harmed, or to persons of that class." *Roberson* v. *United States*, 382 F.2d 714, 720 (9th Cir. 1967) (emphasis added). Instead, both agencies enforced their re-

spective statutory mandates for the public good. Similarly, neither the FAA nor MESA performed a *necessary* service, because the private employer in both situations retained the primary and nondelegable responsibility to comply with the health and safety requirements of the relevant statute. 49 U.S.C. 1425(a); 30 U.S.C. (1976 ed.) 801(e), 801(g). See *Raymer* v. *United States*, 660 F.2d 1136, 1143 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982).[6]

Finally, we argue in *Varig* and *United Scottish* (U.S. Br. 39-46) that the discretionary function exception in 28 U.S.C. 2680(a) precludes liability for claims against federal agencies arising out of their regulatory enforcement activities, because review of an agency's law enforcement decisions in the guise of tort litigation will inevitably "change dramatically [the agency's] regulatory function from that of a policeman to" (in this case) that of a mine operator (U.S. Br. 46). The court of appeals' analysis here may be even more disruptive to the law enforcement efforts of MESA than the Ninth Circuit's decision in *Varig* and *United Scottish* is to the FAA

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[6] We also argue in *Varig* and *United Scottish* (U.S. Br. 34-37) that the plaintiffs in those cases could not reasonably have relied upon the FAA's enforcement efforts, as required by Section 324A(c) of the Restatement (Second) of Torts (1965). That contention does not apply here because respondent and the court of appeals based liability on Section 324A(a) of the Restatement, which provides for liability where the alleged negligence "increases the risk of * * * harm." Reliance is not an element of that tort. But the requirement that the defendant render a service that is necessary to protect a third person applies to all three varieties of good samaritan liability.

We do not seek review here of the decision below that the district court clearly erred in finding that the inspectors' actions were not the proximate cause of respondent's injury. This determination is essentially factbound and presents no issue in common with any contention in *Varig* or *United Scottish*.

because it may tend to deter inspectors from vigorous enforcement of suspected violations. The court characterized MESA's role as "intermeddle[rs]" who "create new dangers" in contrast to "actors who, without some assumption of total responsibility, refrain from changing the *status quo* they observe" (App., *infra*, 13a). While this comparison may be apt in a case such as *Arney* v. *United States*, 479 F.2d 653 (9th Cir. 1973), where the inspector's modification by itself created a danger, it seems completely misapplied where, as here, the ordered modification (the handrail) was not in itself dangerous, the "new dangers" were not apparent to anyone and the inspectors were otherwise ordering the elimination of an existing safety hazard.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense*, No. 82-1349, and *United States* v. *United Scottish Insurance*, No. 82-1350, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MAY 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2931

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED, PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 78 C 1742—George N. Leighton, *Judge.*

Argued February 10, 1983—
Decided August 23, 1983

Before BAUER, WOOD, and ESCHBACH, *Circuit Judges.*

WOOD, *Circuit Judge.* Plaintiff, Donna M. Hylin, appeals from the judgment of the district court in favor of defendant, the United States, in an action brought under the Federal Tort Claims Act, 28 U.S.C. § 2675 *et seq.* (FTCA). The district court found that the allegedly negligent acts and omissions of federal mine inspectors were not the proximate cause of the death of plaintiff's husband, Donald Hylin. The government supports this finding, but, contrary to the district court's ruling, also

argues that federal regulatory enforcement activities, conducted under the authority of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1976) (Mine Safety Act), cannot give rise under these circumstances to a cause of action under the FTCA. We reverse the district court's finding with respect to proximate cause and hold that plaintiff is entitled to recovery under the FTCA.

I.

The facts in this case are largely undisputed. Donald Hylin, a twenty-year employee of the Ristokrat Clay Products Company, a business engaged in mining clay and manufacturing clay bricks in the State of Illinois, was electrocuted on September 1, 1977 when he came into contact with a defective electrical junction box in a conveyor room at the mine. The box was located on the east wall of a passageway connecting the grinding room with a dust bin area. Running the entire length of the passageway was a conveyor belt which carried the mined clay. On both sides of the belt were narrow walkways. The walkway on the east side ran the entire length of the conveyor and up the incline to the dust bin area. The walkway on the west side only extended to the incline ramp. Each walkway, at the time of the accident, was separated from the conveyor belt by newly erected handrails which are at issue in this case and which were erected by the mine in an attempt to comply with a citation resulting from a federal inspection. The clearance between the junction box, located approximately halfway down the east walkway, and the hand rail on that side of the conveyor was reduced to about fourteen inches by the new handrails.

At the time of Hylin's death, and for many previous years, the junction box was in damaged and dangerous condition and in violation of federal standards.[1] The cover of the box lacked an effective means to keep it closed, the wires entering the box were inadequately insulated where the conductors entered the box, and there were two holes in the cover of the box that had been caused by a short circuit or ground fault some seven or eight years prior to Hylin's death.

As a clay mine operation, Ristokrat was subject to the jurisdiction of the Mine Enforcement and Safety Administration (MESA). It was MESA's function, under the authority of the Secretary of the Interior, to enforce the provisions of the Mine Safety Act as amended, including the mandatory safety standards promulgated thereunder and published under Title 30, Part 55 of the Code of Federal Regulations. On February 10 and 11, 1977, several months before Hylin's death, the mine was inspected, pursuant to the Act, by MESA inspectors Donald Johnson and John Guthrie. Neither during this regular inspection nor at a follow-up spot inspection conducted on March 1, 1977, did MESA inspectors inspect the junction box although they observed it and saw its dangerous condition. The inspectors also noticed that the conveyor belt was unguarded and that the workers had a practice of crossing over the conveyor while the belt was in use. The inspectors cited the mine for a violation of 30 C.F.R. § 55.9-7 which required that all conveyors either have guards or be equipped

[1] It is undisputed that the condition of the junction box violated the applicable regulations under the Mine Safety Act contained at 30 C.F.R. §§ 55.12-8, 55.12-13, 55.12-30, 55.12-32 (1976).

with emergency stop devices.[2] Notice was given of the violation with directions that the condition be abated.[3]

The nature of the continuous processing of clay dust from the grinding operation to the conveyor to the dust bins rendered the installation of an emergency stop device on the conveyor infeasible. The use of a stop device would result in clay piling up on the conveyor and jamming the machines. At the time of the citation, the infeasibility of using the stop device was explained by mine personnel to inspector Guthrie who acknowledged that the handrail therefore necessarily would be the mine's response to the Notice of Violation. The mine, with the inspectors' knowledge, subsequently constructed two-by-four handrails along both sides of the conveyor.[4]

At the time of the inspection, the senior MESA inspector, Johnson, was aware from observing footprints and from conversations with Ristokrat's employees that it had been the employees' previous custom to travel from the grinding room to the dust bin area by walking along the west side of the conveyor, crossing the con-

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[2] 30 C.F.R. § 55.9-7; *Mandatory*. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

30 C.F.R. § 55.11-1: *Mandatory*. Safe means of access shall be provided and maintained to all working places.

[3] Notice of Violation No. 53 states: "55.9-7 (Notice No. 53) issued February 10, 1977. An inside handrail or an emergency stop device was not provided on the incline belt conveyor. Shall be abated by February 24, 1977."

[4] Inspector Guthrie's report from the spot, or follow-up inspection conducted March 1, 1977 states:

> "55.9-7 (Notice No. 53) issued February 10, 1977 was abated March 1, 1977. An inside handrail was provided on the incline belt conveyor."

veyor, and then walking up the incline ramp; this route was preferred to the east walkway because it was wider and not obstructed by chutes and the electric junction box. After the handrails were constructed pursuant to the MESA citation, the workers were forced to traverse the narrower east passageway that was already partially obstructed by the junction box; the construction of the handrails further narrowed the clearance in the passageway between the box and the conveyor by at least four inches. It was in the course of following this newly necessitated route that plaintiff was electrocuted by the junction box.

The plaintiff, individually and as administratrix of her husband's estate, sued the United States under the FTCA for the alleged negligence of the MESA inspectors. Plaintiff's first contention was that the negligent failure of the inspectors to observe and cite for corrections the dangerous electrical junction box caused her husband's death. Alternatively, she claimed that the enforcement of the mandatory safety standard requiring handrails, recognized by both the mine owner and the inspectors as the only practical solution, had either created or increased the risk of injury from the defective junction box.

The district court, without a jury, tried only the liability issue. The government offered no evidence.

The court ruled in favor of the government on both liability theories proffered by the plaintiff—negligent failure to inspect, and negligent enhancement of risk. With regard to the latter theory, the court concluded that there was no evidence that the defendant had ever enhanced the risk of electrocution by ordering erection of the handrail and that the evidence instead showed

that the erection of the handrail resulted from Ristokrat's choice. The district court further held that the erection of the handrail was not a proximate cause of plaintiff's death. With respect to the first theory—negligent failure to inspect and cite—the district court did not explicitly determine whether the inspectors' failure was negligent, but instead held that the plaintiff's death was not proximately caused by the defendant's failure to inspect but rather by Ristokrat's negligence in maintaining the box in defective condition.

Plaintiff appeals from the district court's finding with respect to both theories, arguing that the evidence clearly establishes negligence and proximate cause. The defendant argues that the district court's determination regarding proximate cause was correct, but argues further that, even if it were not correct, the Federal Mine Safety Act creates no duty or reliance between the defendant and the plaintiff or the mine sufficient to support a finding of negligence under Illinois tort law, which is expressly made applicable by the FTCA.

II.

The Federal Tort Claims Act renders the United States "liable ... in the same manner and to the same extent as a private individual under like circumstances...." 28 U.S.C. § 2674. The substantive law governing the imposition of liability in each FTCA case is "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b). It will be established, moreover, that FTCA liability may be based even on conduct which is "uniquely governmental," such as inspection and certification, as long as the state in which the conduct occurred would recognize liability if the

government tort feasor were a private person. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955). While the government is correct in asserting that the violation of a duty created by a federal statute and its implementing regulations *alone* does not create an FTCA cause of action, *Baker* v. *F&F Investment Co.*, 489 F.2d 829, 835 (7th Cir. 1973), the issue here is not the violation of a federal duty alone but whether the conduct complained of breached a duty existing under Illinois law. *United Scottish Insurance Co.* v. *United States*, 614 F.2d 188, 193 (9th Cir. 1982); *Raymer* v. *United States*, 660 F.2d 1136, 1140 (6th Cir. 1981). That the United States may thereby become liable under "novel and unprecedented forms of liability," *United States* v. *Muniz*, 374 U.S. 150, 159 (1962), does not undermine the FTCA's admonition that the government shall be liable "in accordance with the law of the place where the act or omission occurred." Thus, the first issue put before this court by the government is really whether Illinois law would permit the finding of negligence in this case if the United States were a private person. *Blessing* v. *United States*, 447 F. Supp. 1160, 1186 (E.D. Pa. 1978).

We think that the Illinois courts would permit a finding of negligence here under the plaintiff's second theory of liability—the increase in risk of injury created by the MESA inspectors' effectively non-optional instruction to build a handrail which had, as we discuss *infra*, the foreseeable effect of diverting worker ingress to the dust bin past the dangerous junction box through a passageway which was further narrowed by the erection of the handrail. Because we find that Illinois law would permit a finding of negligence in this ex-

traordinary instance of the positive creation of increased danger by an inspector, we need not determine today whether Illinois would recognize liability under the plaintiff's first—and frankly more troubling—theory of mere negligent failure to inspect the junction box and order correction.

The basis of liability under both the plaintiff's theories is the "good samaritan doctrine" as enunciated in the Restatement (Second) of Torts § 324A (1965) and adopted by the Illinois courts. *Pippin* v. *Chicago Housing Authority*, 78 Ill. 2d 204, 210 (1979) ("In assessing [the inspector's] duty in tort owed to Pippin as a result of its contract with the Authority, we find section 324A of the Restatement (Second) of Torts to be apposite."); *Cross* v. *Wells Fargo Alarm Services*, 82 Ill. 2d 313, 317 (1980); *Chisolm* v. *Stephens*, 47 Ill. App. 3d 999, 1005 (1st Dist. 1977); *Green* v. *City of Chicago*, 48 Ill. App. 3d 502, 504 (1st Dist. 1976). The Restatement (Second) of Torts § 324A provides as follows:

> § 324A. Liability to Third Person for Negligent Performance of Undertaking
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or

> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The essence of plaintiff's second theory—that the MESA inspectors failed to exercise reasonable care in ordering the erection of the handrail, thus increasing the likelihood of electrocution—is, of course, echoed in Section 324A(a), while the plaintiff's first theory, negligent inspection, is reflected in Section 324A(b) and (c).

As we understand the government's argument, it disputes primarily that there could never be negligence here under the negligent inspection theory reflected in Sections 324(b) and (c) because neither has MESA "undertaken to perform a duty [*i.e.* to ensure a reasonable safe work environment] owed by the other [the mine] to the third person [the plaintiff]" under Section 324A(b) nor was the "harm ... suffered because of reliance of the [mine] or the [plaintiff] upon the undertaking." The absence of such a prerequisite "duty" or "reliance," the government argues, is facially apparent from the caveats contained in Section 801 of the Mine Safety Act, 30 U.S.C. § 801, under which the inspection was conducted. Section 801(e) states that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such unsafe and unhealthful conditions and practices in such mines." Section 801(g) further states that "[i]t is the purpose of this chapter ... (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards" as are promulgated under the Act by the Secretaries of Health and Human Services and Labor. The government contends that this statutory placement of responsibility precludes a court

from finding the requisite duty or reliance as a matter of law.

We note that the Sixth Circuit has found this argument convincing, holding in *Raymer* v. *United States*, 660 F.2d 1136, 1143 (1981), that "[i]n the face of this language which completely negates the idea that responsibility for mine safety has been shifted to the federal government, it would be unreasonable to rely on the mere failure of federal inspectors to require immediate abatement of the ... [violation]." But whatever the force of this position, and it has been questioned by some Ninth Circuit decisions finding FTCA liability for inspections conducted under Federal Aviation Administration statutes containing similar "primary responsibility" boilerplate,[5] and whatever its applicability under the Illinois tort doctrines concerning mere failure to inspect, the "reliance" and "duty" requirements of Sections 324A(b) and (c) cannot block recovery here, for plaintiff's second theory of liability rests wholly on the "increased risk of harm" theory of Section 324A(a).

Although we have found no Illinois cases involving actions founded on ameliorative conduct engendering an increase in the risk of harm rather than a mere failure to act,[6] it is quite clear from an examination of Section

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[5] *See, e.g., S.A. Empresa de Viaco Aerea Rio Grandense* v. *United States*, 692 F.2d 1205, 1208 (9th Cir. 1982); *United Scottish Insurance Co.* v. *United States (II)*, 692 F.2d 1209, 1211 (9th Cir. 1982); *but see, Clemente* v. *United States*, 567 F.2d 1140, 1149 (1st Cir. 1978).

[6] The court in *Cross* v. *Wells Fargo Alarm Services*, 82 Ill. 2d 313, 317 (1980), briefly noted plaintiff's claim against a private security agency for the latter's *failure to inspect or evaluate* after-hours security conditions in a public housing unit. The claim was formally premised on both Sections 324A(a) and (c). In dismissing the complaint, the court discussed the failure of

324A and its commentary that liability may be imposed for a defendant's actions increasing the risk of harm, even though there is no evidence that defendant had assumed an employer's or proprietor's general duty of providing reasonably safe conditions to his employees or customers and no evidence that the employees or customers "relied" to their detriment on the defendant's provision of services.

First, as a textual matter, Section 324A's three theories—increase in risk of harm, assumption of duty, and reliance—are phrased in the disjunctive; while subsections (b) and (c) contain the words "duty" and "reliance," subsection (a) is conspicuously devoid of such terms. Second, the text's accompanying illustrations and commentary suggest that liability under Section 324A(a) may exist without presence of "duty" or "reliance." Illustration 1, for example, sets forth this vignette:

> 1. A operates a grocery store. An electric light hanging over one of the aisles of the store becomes

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the plaintiff to plead reliance by the public housing authority on such evaluations. However, the two-theory context of the discussion and the factual inappositeness of a mere "failure to inspect or evaluate" claim to Section 324A(a) analysis suggests that the court did not mean to impute the "reliance" requirement, contained only in Section 324A(c), to 324A(a) as well. Instead, the court apparently disposed of the Section 324A(a) claim by relying on its earlier finding that defendant assumed no contractual obligation at all to conduct the evaluations, thus finding unsatisfied the basic Section 324A requirement that the defendant at least "undertake[] ... to render [the disputed] services...." That the Illinois Supreme Court, when addressing the issue more fully, has kept the requirements of subsection (a) analytically distinct from the "reliance" and "duty" prerequisites of subsections (b) and (c) is demonstrated in *Pippin* v. *Chicago Housing Authority*, 78 Ill. 2d 204, 211 (1979), quoted in text *infra* at 11.

> defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C.

Thus, liability is placed upon the outside actor even though it has not, as the government would analogously have us assume here, either caused customers or the company to rely on its undertaking with respect to store maintenance or assumed the company's duty to maintain a reasonably safe store. That the defendant's actions increasing risk need not occur as part of a general duty or trigger "reliance" to be actionable under Section 324A(a) is also underscored by comment d which states, "*Even where the negligence of the actor does not create any new risk or increase an existing one*, he is *still* subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person." (emphasis added). Such commentary suggests that increased risk of harm provides a wholly independent and self-sufficient, rather than a subsidiary, basis for liability. *See also Pippin* v. *Chicago Housing Authority*, 78 Ill.2d 204, 211 (1979) ("Interstate's duty does not arise under either subsection (a) or (b), as plaintiff's complaint does not allege that Interstate's conduct actually increased the risk of harm to Pippin, and ... there was no preexisting duty .... Subsection (c), however, sets up reliance upon the undertaking as a *separate basis* for finding liability." (emphasis added)).

And this reading, we believe, comports most fully with common sense and sound policy. The disjunctive

regime of liability under Section 324A simply affords less protection to actors who, like the MESA inspectors here, positively intermeddle and create new dangers, than to actors who, without some assumption of total responsibility, refrain from changing the *status quo* they observe. This regime is consonant with the good samaritan concept as with much of tort law by fully encouraging only more modest and passive forms of altruism.

In sum, we find that Section 324A, as adopted by the Illinois courts, allows recovery by the plaintiff in this case even assuming *arguendo*, as the government contends, that MESA neither created reliance by miners on safety inspections nor caused the government to assume the employer's role of guarantor of safe job conditions.

We are not the first federal court to recognize the appropriateness of an FTCA action rooted in state tort law corresponding to Restatement (Second) of Torts § 324A(a). Several federal cases have alluded to the applicability of this analysis while finding that the facts of the case did not meet the Section's requirements. *See, e.g.*, *Raymer* v. *United States*, 660 F.2d 1136, 1143 (6th Cir. 1981); *Clemente* v. *United States*, 567 F.2d 1140, 1145 (1st Cir. 1978); *Blessing* v. *United States*, 447 F. Supp. 1160, 1197 (E.D. Pa. 1978). The government has presented no argument, and we know of none that exists, for the proposition that the principles of Section 324A(a) are inapplicable to the acts of MESA inspectors. We, therefore, affirm the district court's holding that a cause of action exists under Illinois law against a private person for a negligent inspection which increases the risk of harm to the beneficiaries of that inspection. As the action is recognized by the State of Illi-

nois against private individuals, the FTCA's limited waiver of sovereign immunity applies and the United States may be held liable for similarly negligent post-inspection actions ordered on its behalf.

III.

The government urges alternatively that, even if a valid cause of action otherwise exists for the inspector's enhancement of risk under Illinois tort law and hence the FTCA, such a claim is barred under the "discretionary function" exception in the FTCA, 28 U.S.C. § 2680(a). We find this contention to be without merit.

The Supreme Court has not comprehensively defined the scope of the "discretionary function" exception, other than to note that it "includes determinations made by executives or administrators in establishing plans, specifications or schedules or operations. Where there is room for policy judgment and decision there is discretion." *Dalehite* v. *United States*, 346 U.S. 15, 35-36 (1953). The great weight of authority suggests that where, as here, the disputed conduct consists of merely implementing and enforcing mandatory regulations, the requisite halo of policy-making is not present. *See, e.g., United Scottish Insurance Co.* v. *United States*, 692 F.2d 1209, 1212 (F.A.A.'s negligent certification of aircraft not within discretionary function exception, noting "F.A.A. officials enforce the requirements by inspecting the aircraft, but cannot in any way change or waive safety requirements. Since no room for policy judgment or decision exists, a discretionary function is not being performed...."); *Schindler* v. *United States*, 661 F.2d 552, 556 (6th Cir. 1981) (regulatory approval granted in conformance with federal regulatory

criteria not discretionary function); *Downs* v. *United States*, 522 F.2d 990, 997-98 (6th Cir. 1975) (exception only encompasses exercise of quasi-legislative or quasi-judicial function; mere fact that governing regulations permit choosing alternative courses of action does not invoke exception); *Griffin* v. *United States*, 500 F.2d 1059, 1066 (3d Cir. 1974) (fact that implementation of regulation calls for some judgmental determination with reference to criteria in regulation does not invoke exception as such determinations are of expert rather than public policy character).

Here, there is no dispute that the applicable MESA regulations compelled the erection of the handrail. 30 C.F.R. § 55.9-7 was a mandatory standard requiring that conveyors be either guarded or equipped with emergency stop devices; in this case, the inspectors knew that the handrail option had to be chosen. The inspectors were required by 30 U.S.C. § 727(b) to, and did, issue the corrective order. While the inspectors were also adjured by the MESA Inspection and Investigation Manual to "not create a dangerous situation in enforcing compliance with a standard," such an instruction is hardly more than a restatement of the due care incumbent on any civil servant carrying out predetermined regulatory imperatives; it does not call for the exercise of quasi-legislative or -judicial judgment, *Downs*, 522 F.2d at 997-98.

By contrast, *Bernitsky* v. *United States*, 620 F.2d 948 (3d Cir. 1980), *cert. denied*, 449 U.S. 870 (1981), cited by the government, involved a mine inspector's issuance of a withdrawal order after the mine's repeated failure to comply with citations. In holding such action within the "discretionary function" exception, the court

emphasized that the controlling statutory provision required the inspector, before issuing such an order, to determine such discretionary factors as "imminent danger" and a "reasonable time" for abatement, and to choose among "different types of enforcement actions available." 620 F.2d at 954-55. Here, however, the applicable regulations made clear that there was only one enforcement action available upon discovery of the conveyor's condition: the abatement order which effectively compelled the construction of the handrail. In any event, to the extent that *Bernitsky* can be read as a blanket extension of the "discretionary function" exception to all regulatory enforcement, we think that it fails to properly respect the distinction between policy-making and implementation articulated in the Supreme Court's *Dalehite* decision and subsequent appellate interpretations, including directly apposite inspection cases such as *United Scottish Insurance Co., supra.* If the nearly automatic issuance of the citation here were considered to be a "discretionary function," it would be hard to imagine any governmental activity which would be actionable under the FTCA.

IV.

We now reach the question that is formally before us on appeal: the correctness of the district court's finding that any negligence of the government inspectors was not the proximate cause of Donald Hylin's death. Although the trial judge did not make a specific finding that the government inspectors were negligent in the performance of their good samaritan tasks, the trial court's "inquiry into proximate causation presupposes an affirmative finding of negligence." *Glenview Park*

District v. *Melhus*, 540 F.2d 1321, 1325 (7th Cir. 1976), *citing* 65 CJS *Negligence* § 13 at 1134 (1966). The evidence in the record as it appears before this court supports a finding that the MESA inspectors were negligent in failing to take into account the effect of the Notice of Violation which resulted in the construction of the handrails which narrowed the passageway and forced the workers to walk by the dangerous junction box.

The Notice of Violation No. 53 was considered a mandatory notice. 30 C.F.R. § 55.9-7 requires that "unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length." The MESA inspectors had no choice but to issue the notice. There was no negligence, and the plaintiff does not so claim, in the issuance of Notice of Violation No. 53 alone. The inspector's negligence was in failing to consider the consequences of their action. The MESA Inspection and Investigation Manual instructs that "[a]n inspector shall consider his action during the inspection and shall not create a dangerous situation in enforcing compliance with a standard." MESA inspectors Donald Johnson and John Guthrie failed to do so. While liability under the FTCA cannot be based on the violation of a federal statute or regulations, the regulations may provide guidance as to the standard of care that a reasonable person owes a given situation. *United Scottish Insurance Co. (I), supra*, 614 F.2d at 195 n.9 ("Once the court has found an actionable duty under state law, the federal regulation may well have provided relevant evidence as to what conduct would be reasonable under all the circumstances"). The MESA manual provides such a standard of care in this case,

and the inspectors failed to perform their jobs at that level.

The negligence of the inspectors in failing to consider the consequences of the issuance of the Notice of Violation substantially increased the risk and made it almost inevitable that someone would be harmed by the dangerous junction box. Although the presence of the junction box and its condition were not affected by the Notice of Violation, the workers at the Ristokrat Mine were. The erection of the guardrail narrowed the gap between the junction box and the conveyor by at least four inches, to fourteen inches, thus making it more difficult to pass by the box without coming in contact with it. The railing also forced the workers to cease their practice of crossing over the conveyor at a point beyond the box and to walk past the box, and through the narrow gap, whenever they needed to go to the dust bin area.

The district court found, however that the issuance of the Notice of Violation No. 53 was not a proximate cause of Donald Hylin's death. Under Illinois law, questions of proximate causation are questions of fact, *Ney* v. *Yellow Cab Co.*, 2 Ill.2d 74, 84 (1954); *Ray* v. *Cock Robin, Inc.*, 57 Ill.2d 15, 23 (1974); *Watson* v. *Chicago Transit Authority*, 12 Ill. App. 3d 684, 692 (1st Dist. 1973); *Dooley* v. *Darling*, 26 Ill. App.3d 342, 354 (5th Dist. 1975), and such determinations are therefore to be reviewed under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). Within the clearly erroneous standard, this court has enunciated a broad scope of review when the basic facts of the case are not in dispute. *City of Mishawaka, Indiana* v. *American Electric Power Co.*, 616 F.2d 976, 979 (7th Cir. 1980); *Flowers*

v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *Apolski's* v. *Concord Life Insurance Co.*, 445 F.2d 31, 34 (7th Cir. 1971); *Yorke* v. *Issei Produce Co.*, 418 F.2d 811, 814 (7th Cir. 1969). As we stated in *Yorke*

> When the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is much broader than where disputed evidence and questions of credibility are involved.

Id. at 814. The facts in the present case are largely undisputed. The government presented no witnesses or exhibits. The credibility of the witnesses that did testify was not challenged and there were no inferences to be drawn from conflicting testimony. A substantial part of the record consisted of stipulation of fact and disposition testimony of the MESA employees. The only real dispute at the trial was the legal significance of the agreed upon occurrences. While we are not free to substitute our own judgment in the matter, we may reverse if, after a review of the evidence, "we are left with the definite and firm conviction that a mistake has been made." *Glenview Park District*, 540 F.2d at 1324. As to appellant's second claim, regarding the construction of the handrails, we have such a conviction.

The trial court's finding that the MESA inspectors' negligence in failing to consider the consequences of the issuance of a Notice of Violation for lack of handrails or emergency stop device on the conveyor belt was not the proximate cause of Donald Hylin's death seems to have turned on three determinations. The first was the drawing of a semantic distinction between a "barricade" which plaintiff alleged had been ordered and a "handrail

or barrier" which was constructed. The second basis of the trial court's finding was that the MESA inspector did not order the installation of the handrail but left the operator of the mine with the option of installing either an emergency stop device or the handrail. And the third apparent basis, although explicitly mentioned by the trial court only in connection with the plaintiff's negligent inspection theory, was that the accident was due "entirely" to the company's negligent maintenance of the junction box rather than to any acts or omissions of the MESA inspectors. We shall address each ground.

First, whatever the definitional distinctions between "barricade," "barrier," and "handrail," one of the effects of the installation of the two-by-four device was clearly to prevent the workers from crossing the conveyor belt as they had prior to its construction. The MESA inspectors, Donald Johnson and John Guthrie, both testified that this was one purpose of the handrail. Any determination that the issuance of Notice of Violation No. 53 was not a proximate cause cannot be properly based on the semantic characterization of the device constructed by Ristokrat in response to the notice. It is clear that one purpose of the "handrail" or "barrier," and its major effect, was to prevent the workers from crossing the conveyor belt and to force them to walk down the left side of the belt and to pass by the faulty junction box.

The trial court's second and third determinations that led to its finding of no proximate cause were its finding that Notice of Violation No. 53 was not an order to construct the handrail but instead "was a report that noticed violations and allowed Ristokrat to elect how to abate those violations and the authorities at Ristokrat

decided that the best way to do it was the erection of the handrail..." and that, in any event, the true cause of the accident was the defective junction box, not the handrail order. But it is undisputed that Notice of Violation No. 53 left Ristokrat with a choice as to how to correct the violation. Ristokrat could have installed an emergency stop device or the handrail. But it is also undisputed that the emergency stop device was not feasible, given the nature of the mine's continuous operation, and that the inspectors were aware of this fact. Ristokrat did not have the option of ignoring the Notice of Violation; to do so could lead to either criminal penalties or a debarment order closing the conveyor room. 30 U.S.C. § 727(b). MESA inspector Guthrie knew that Ristokrat's response to Notice of Violation No. 53 would be to install the handrails and that the result of this installation would be to redirect worker ingress through a narrow passageway past the junction box whose dangerous condition he observed. And on a follow-up spot inspection conducted on March 1, 1977, Guthrie observed, and his report reflected, that Ristokrat's response to the notice had been to erect the handrails. The trial court was correct in finding that Notice of Violation No. 53 was not an order to erect a barricade. But we feel compelled to respectfully express our view that the court erred in drawing certain conclusions from this finding.

The authorities at Ristokrat did "choose" to erect the handrail over the infeasible emergency stop device. Likewise, they chose to leave the junction box in its defective condition. These choices, however, do not amount to unforeseeable, independent and intervening causes which break the chain of causation from the in-

spectors' negligence to the subsequent death of Donald Hylin. Under Illinois law, proximate cause is that cause which, in natural or probable sequence, produces the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury. *Nelson* v. *Union Wire Rope Corp.*, 311 Ill. 2d 69, 88 (1964); *Ray* v. *Cock Robin, Inc.*, 57 Ill. 2d 19, 23 (1974); *Watson* v. *Chicago Transit Authority*, 12 Ill. App. 3d 684, 692 (1st Dist. 1973); I.P.I.2d, § 1501 (1971). For our purposes, there are two important facets to Illinois' definition of proximate cause.

The first is that there may be more than one proximate cause of the injury. The fact that the owners of the Ristokrat Mine were also negligent in failing to keep the junction box in safe condition or that their negligence was "closer" to the injury, in that the junction box was the instrument of death, does not necessarily break any causal connection that may exist between the negligence of the MESA inspectors and the death of Donald Hylin. "It is . . . well established [in Illinois] that where the concurrent negligence of two parties causes injury which would have been avoided but for the negligence of either, the negligence of each is the proximate cause of the injury." *Dooley* v. *Darling*, 26 Ill. App. 3d 342, 354 (5th Dist. 1975).

The second aspect of the Illinois definition of proximate cause is that liability extends to the injuries that are the natural and probable consequences of the negligence. The natural and probable consequences include any intervening cause which "the first wrongdoer might have reasonably anticipated . . . as a natural and proba-

ble result of the first party's own negligence." *Merlo* v. *Public Service Co. of Northern Illinois*, 381 Ill. 300 (1943). "The intervention of independent, concurrent or intervening forces will not break the causal connection if the intervention of such independent force was itself probable and foreseeable." *Wintersteen* v. *National Coperage and Woodenware Co.*, 361 Ill. 95 (1935). *See also Neering* v. *Illinois Central Railroad Co.*, 383 Ill. 366, 380-81 (1954); *Ney* v. *Yellow Cab Co.*, 2 Ill.2d 74, 79-81 (1943). Ristokrat's response to the Notice of Violation was not only probable and foreseeable but inspector John Guthrie left the mine knowing that the handrail would be installed and consequently that the workers would be forced to pass closely by the junction box whose dangerous and defective condition the inspectors observed. We thus believe that the trial court erred in determining that the issuance of Notice of Violation No. 53, without considering the consequences thereof, was not a proximate cause of Donald Hylin's death.

CONCLUSION

For the foregoing reasons, we hold that a cause of action exists under the Federal Tort Claims Act, 28 U.S.C. § 2674 *et seq.* for the negligent inspection of a mine, conducted under the authority of the Federal Metal and Nonmetallic and Mine Safety Act, 30 U.S.C. § 721 *et seq.* (1971), when such negligent inspection increases the risk of harm to third persons. We reverse the trial court's finding that the negligence of the Mine Enforcement and Safety Administration inspectors was not the proximate cause of Donald Hylin's death, and remand for further proceedings consistent herewith.

REVERSED AND REMANDED.

BAUER, *Circuit Judge*, dissenting. I do not agree that plaintiff's second theory of liability, that by their enforcement of mandatory safety standards requiring handrails the federal mine inspectors negligently enhanced the risk of injury from the defective junction box, states a cause of action under Illinois law. Therefore, I respectfully dissent.

The instrumentality of harm in this case, both before and after the handrails were installed, was the defective junction box. Thus, plaintiff's first theory of liability was premised on the federal inspectors' negligent failure to observe the hazard created by the junction box and to order the hazard abated. The district court denied recovery under this theory on the basis that the inspectors' failure to inspect and cite the defective junction box, even if negligent, was not the proximate cause of Hylin's death.

The majority concedes that plaintiff's theory of mere negligent failure to inspect the junction box and order correction is troublesome. Nonetheless, the majority imposes liability on the basis that the inspectors negligently enhanced the risk of injury from the defective junction box. I am not satisfied, however, that plaintiff's two theories are sufficiently different to allow of this distinction.

The risk, if any, that arose from the inspector's order that handrails be installed was not inherent in the handrails. Rather, the risk was that by reducing the free access past the junction box by four inches there was an increased probability that a worker would make physical contact with the defective junction box. And this risk, the risk of physical contact with the junction box,

could only have been avoided by inspection and correction of the junction box itself.

Unlike the majority, I am unable to draw a bright line between "mere negligent failure to inspect the junction box and order correction," *ante* at 7, and what I consider to be mere negligent failure to inspect the junction box in conjunction with its environs and order correction. Thus, under the circumstances of this case, I would find that plaintiff has failed to state a cause of action under Illinois law. Accordingly, I would hold that plaintiff's cause of action under the FTCA must likewise fail.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 81-2931

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED, PLAINTIFF-APPELLANT,

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States
District Court for the Northern District of
Illinois, Eastern Division.
No. 78 C 1742
George N. Leighton, *Judge.*

December 7, 1983

Before
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for defendant-appellee, no

judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 81-2931

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED, PLAINTIFF-APPELLANT,

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division
No. 78 C 1742
Judge George N. Leighton

August 23, 1983

Before
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the

said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 1742

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONAL HYLIN, DECEASED, PLAINTIFF,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

PARTIAL TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. GEORGE N. LEIGHTON, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Thursday, November 5, 1981 at the hour of 11:30 a.m.

APPEARANCES:

MR. ROBERT B. PATTERSON
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appeared on behalf of the Plaintiff;
MR. JAMES P. KLAPPS
MS. MARY GRAD
United States Department of Justice
Torts Branch, Civil Division
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appeared on behalf of the Government.

THE COURT: This is a civil action under the Federal Tort Claims Act by Donna Hylin, individually and as

Administrator of the Estate of Donald Hylin, Deceased, against the United States. The Court, as required by the statute, has heard the case without a jury and having heard testimony of witnesses, admitted in evidence Exhibits, makes the following findings of fact:

The trial has been bifurcated as to liability and damages, and the evidence shows that on September 1, 1977, the plaintiff's decedent, Donald Hylin, was an employee of the Ristokrat Clay Products Company in the Village of Lowell, LaSalle County, Illinois.

On that day, at the end of the afternoon's work shift, he was found lying dead on a dirt walkway extending between a conveyor and the wall on which hung an electrical junction box containing exposed wires. There were no witnesses to the death of Donald Hylin.

Burn marks found on the back of his left shoulder, skin and hair found on the wires and the dimension between the floor and the wires demonstrate that Hylin suffered an electrical contact with the exposed conductor, which caused his death by electrocution.

The room in which the box was located contained a conveyor which ran in a generally north-south direction, two narrow walkways on each side. The walkway on the right or west side of the conveyor starts at the south end of the conveyor. The walkway on the left side, or east of the conveyor, which runs along the wall on which the junction box was hung, runs the entire length of the conveyor in that room and then continues up an incline ramp to the dust bin area.

The electrical junction box in question was hung on the wall approximately half way down the walkway. The top of the box was five feet three inches from the ground and the dimensions of the box were twelve

inches high, eight and one-half inches deep and eighteen inches wide.

The diagonal clearance between the junction box and the handrail which was in place on September 1, 1977 along the conveyor, was approximately fourteen inches. That clearance had been reduced by aproximately four inches by the installation of a handrail which was constructed with vertical pieces of two by four lumber, at which were attached horizontal railings of two by four lumber.

Railings on both sides of the conveyor were installed by the operator after February 10, 11, 1977, in response to a notice of violation issued during an inspection of the conveyor room by Donald Johnson and John Guthrie of the Mine Enforcement and Safety Administration of the Bureau of Mines of the Department of Interior of the United States government. The mandatory requirement which the notice required to be abated, required either handrail or emergency stop device. Which of these methods of abating this violation was a matter left to the operator.

At no time did any MESA employee order George McMahon or any Ristokrat employee to install a barrier or handrail to abate the violation cited in Notice 53.

Paragraph 53 of the Mine Enforcement and Safety Administration Notice of Violation issued after the February 10, 11, 1977 regular inspection directed Ristokrat to abate the violation at the conveyor by either installing handrails or an emergency stop device.

When the electrical junction box in question on the wall of the conveyor was open, it constituted a serious and imminent danger to a person who would pass it if, at the time, the conductor was in such a condition that

there would be no means of retaining the lid in a closed position, and thus, there would be inadequate insulation at the upper righthand corner where conductors entered the box. A damaged frame, which is evidenced from the pictures of it, would further degrade the ability of the box to remain closed and holes in the lid would signify that a ground fault condition would exist and might continue to exist.

The damaged condition of the box, being the holes in the lid, the damaged frame, the inadequate insulation and the lack of effective means to keep the cover closed had existed at various times for many years prior to September 1, 1977, and at least since the time of a short circuit in the box some seven or eight years before, that left a hole that was visible at or about the time of the incident in question.

Prior to the incident, on September 1, 1977, the MESA inspectors never inspected the junction box located at the incline conveyor belt area. Prior to the installation the handrail, done in response to the MESA citation, the employees at Ristokrat customarily traveled between the grinding room and the dust bin area by walking along the right west side of the conveyor to its south end and then by crossing the conveyor and then by walking up the incline ramp to the dust bin area. This route was easier than walking down the left, or east, walkway, because it was wider and was not obstructed by chutes and an electric junction box which partially obstructed the left walkway.

At the time of the inspection on February 10, 11, 1977, the senior MESA inspector, Donald Johnson, knew that men followed the path down the right side of the conveyor and would cross the conveyor to travel to

the dust bin because he saw footprints, indicating such conduct, and from conversation during the inspection and post-inspection conference.

As a clay mine operation, Ristokrat was subject to the jurisdiction of the Mine Enforcement and Safety Administration. It was MESA's function, under the authority of the Secretary of the Interior, to enforce the provisions of the Metal and Nonmetallic Mine Safety Act, 30 U.S.C. Section 721, et seq., as amended including the mandatory safety standards promulgated thereunder and published at Title 30, Part 55, of the Code of Federal Regulations.

On and prior to September 1, 1977, MESA's function included the power to issue notices of violation which required mine operators to eliminate dangerous conditions or practices which violated mandatory safety standards. Refusal to comply with notice of violation subjected the mine operator to sanctions such as closure of the operation and, in some instances, where applicable, criminal penalty.

As a clay mine operation, Ristokrat was subject to the jurisdiction of the Mine Enforcement and Safety Administration. It was MESA's function, under the authority of the Secretary of the Interior, to enforce the provisions of the Metal and Nonmetallic Mine Safety Act, 30 U.S.C., Section 721, et seq., as amended, including the mandatory safety standards promulgated thereunder and published under Title 30, Part 55 of the Code of Federal regulations.

On February 10 and 11, 1977, MESA Inspector, Donald Johnson, and Trainee John Guthrie, conducted a regular inspection of the Ristokrat plant, which regular inspection required them to inspect every aspect of the

operation of the plant for safety and health hazards, including the electrical junction box on the wall of the conveyor room.

John Guthrie has testified in this case that he either could not recall seeing the box at the time of the February 10, 11, 1977 inspection or that he saw the box and paid no attention to it.

Donald Johnson has testified in this case that either he did not see the box or that he did see the box and did not observe, readily observe, the holes in the cover thereof at the time of the February 10-11 inspection.

On March 1, 1977, John Guthrie returned to the conveyor room at the Ristokrat plant on a compliance spot inspection. At that time, John Guthrie verified that the handrails on both sides of the conveyor had been installed, but he did not see or inspect the electrical junction box which obstructed passage through the walkway on the left side of the conveyor.

The Ristokrat operation had only 47 employees and did not have a safety department or an electrical engineer on its staff. Prior inspections of this plant, going back to the time the policy of the government to perform such inspections began, to and including the last inspection made by MESA agents before September 1, 1977, does not disclose that any inspector ever saw or noticed this electrical junction box which, on September 1, 1977, caused the death of Donald Hylin. Employees of Ristokrat, Billy Beavers, and Andy Stachowiak, who were in or around the place where this junction box was located, have testified that they didn't recall seeing that box.

From these facts, the Court reaches the following conclusions of law:

First, it has jurisdiction of the parties and the subject matter pursuant to the provisions of United States Code, Section 1346(b) and the provisions of the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq.

The complaint in this case was tested by motions for summary judgment and motion to dismiss and on the facts alleged, this Court found that it stated a claim for relief and, therefore, it submitted the matter to the jurisdiction of this Court, pursuant to the applicable statute.

The Federal Tort Claims Act provides a remedy against the United States for, and I quote:

> "Personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law where the act or omission occurred."

That quotation comes from 28 U.S.C., Section 2674.

Previously, at pre-trial proceedings, this Court denied defendant's motion to dismiss and for summary judgment, the latter on the ground that—and I quote:

> "Since plaintiff has alleged in her complaint that the Mine Enforcement and Safety Administration ordering the installation of the barricade created a hazardous condition that caused her husband's death, it cannot be determined as a matter of law that defendant did not have a duty to oversee the correction of such a condition."

In ruling on the motion to dismiss, this Court predicated its ruling entirely on the allegation contained in the complaint, which admitted the facts alleged as true, that the defendant had ordered the installation of a bar-

-icade and thus created a hazardous condition that caused her husband's death, "it cannot be determined as a matter of law that defendant did not have a duty to oversee the correction of such a condition."

In ruling on the motion to dismiss, this Court predicated its ruling entirely on the allegation contained in the complaint which admitted the facts alleged as true, that the defendant had ordered the installation of a barricade and thus, created a hazardous condition which caused her husband's death.

These were the grounds for the denial of the motion to dismiss and the motion for summary judgment.

The Court has reviewed the affidavits in a motion for summary judgment and again refreshes its recollection that the affidavits and counter-affidavits raised or indicated the record contained material issues of fact, namely, whether or not the United States, acting through its MESA agents, had, in fact, ordered the erection of a barricade so that it caused a condition to exist that contributed or caused the death of the plaintiff' intestate.

Now, throughout the course of this trial, the plaintiff has urged two theories or predicates of tort liability. The first of these theories revolves around the alleged failure of Federal Mine Inspectors to have discovered, in the course of statutory authorized enforcement inspections, the existence of a certain dangerous condition with respect to the electrical junction box which electrocuted plaintiff's decedent.

Second, the plaintiff maintains that the mine inspector "ordered that a barricade be installed on the right side of a conveyor, thereby forcing employees to use the narrow walkway on the left side of the

conveyor, which placed them in close proximity to the defective junction box."

In the course of this case, including the argument of counsel in summation, there has been a modification of this position by the plaintiff and the Court assumes that this modification has been adopted in order to adjust to the evidence which shows without question that no one employed by the United States ever ordered the authorities at Ristokrat to erect a barricade. What happened was, the evidence shows without question, was a report that noticed violations and allowed Ristokrat to elect how to abate those violations and the authorities at Ristokrat decided that the best way to do it was the erection of the handrail which is shown on Plaintiff's Exhibits 11 and 14.

Therefore, the allegation of the complaint that led the Court to denying the defendant's motion to dismiss and the issues of fact that arose in summary judgment, are not supported by the evidence heard by the Court at the trial of the case on the merits.

With respect to the contention that the failure of MESA inspectors to have discovered and caused the correction of defects in the junction box, this Court concludes on the evidence it has heard that the record does not support an undertaking to render such service which, as such, would allow the imposition of liability under any cognizable common law theory of recovery.

The defect in the argument made in this case is the failure of plaintiff to understand that under fundamental law of tort liability of Illinois and every American jurisdiction with which this Court is familiar, there cannot be liability unless the evidence shows that there

was negligence and that the negligence of the defendant or its agents caused the injury to the plaintiff.

In this case, the evidence shows that the negligence that injured the plaintiff through the death of her intestate, Donald Hylin, was the defective electrical junction box. That defective electrical junction box was on that wall from the time evidently this clay company occupied the building. It has been estimated either in documents which the Court has read or in testimony of witnesses, that this electrical junction box has been on this wall for some 50 years. It hasn't been noticed by anyone and whether or not it was always in the defective condition it was in on September 1, 1977 is not clear from the evidence. It is obvious that it was defective on September 1, 1977 because the parties agree that it electrocuted Donald Hylin. So, that is what caused the death of Donald Hylin, not the failure of the inspectors to see it, not the failures of the inspectors to notify Ristokrat about it, not the erection of the barrier as is described by the plaintiff, or barricade, or as the evidence shows a handrail put there legally, lawfully and properly to comply with a notice of violation, but, the defect in the box, in other words, the negligence of Ristokrat caused the injury to the plaintiff, to the death of her intestate.

That being so, there is no theory of liability that can be imposed on the United States government, for the simple reason that the evidence doesn't show one important requirement in the law of torts, that the negligence of the defendant and its agents caused the injury to the plaintiff, because the cause of the injury was entirely the result of a defective electrical junction box that was in that wall and not seen by anybody, including Donald Hylin's fellow employees.

Therefore, for these reasons, judgment will be entered for the defendant, the United States. Costs to follow in accordance with statute in such cases.

That is the ruling of the Court.

These findings will be part of the record. As I said, if there are additional ones that you think have not been considered by the Court that should be considered to complete this record, you may propose them and I will consider such requests.

Thank you very much.

MR. PATTERSON: One question, Your Honor.

THE COURT: Yes.

MR. PATTERSON: Is judgment entered as of today?

THE COURT: Yes, judgment will be entered as of today.

MR. KLAPPS: Thank you, Your Honor.

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No. 83-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED,

Respondent.

BRIEF OF DONNA HYLIN, RESPONDENT, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED BY THE UNITED STATES

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QUESTION PRESENTED

Whether the widow and children of a mineworker, whose death resulted from a fatally dangerous condition created primarily by the government's negligence, that consisted in ordering a change in the work place under one mandatory inspection standard that could not safely be made without other changes that the government improperly failed to order under other mandatory inspection standards, shall be denied compensation for his death under the federal tort claims act, 29 U.S.C. §§ 1346(b), 2674, although any private individual guilty of the same misconduct would be liable under Illinois law, following the Restatement (Second) of Torts, Section 324 A, subparagraph (a).

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STATEMENT

The government actually worsened the risk of death and injury during its mine safety inspection giving rise to this case. The Seventh Circuit Court of Appeals found liability on that sole basis, not on the basis of a mere failure to detect a risk.* Thus, the only question now genuinely

* The Seventh Circuit expressly declined to base liability on plaintiff's alternative theory of a failure to detect risk and did not decide that issue. *Hylin v. United States*, 715 F.2d 1206, at 1210 (7th Cir. 1983).

presented is whether the government can avoid liability even when it affirmatively creates a hazard causing injury or death.

It is revealing of how far the Department of Justice now goes to avoid responsibility to compensate American citizens killed or injured because of the government's negligence that it acknowledges no difference between creating a dangerous condition and failing to detect one caused by others. The distinction is not lost on Hylin's widow. Her husband paid for it with his life. The record leaves no doubt that if the government had ordered no changes in the mine where Mr. Hylin worked, or had never appeared there at all, he would not have been killed. *Hylin v. United States*, 715 F.2d 1206, at 1208-1209 (7th Cir. 1983).

The change ordered was the erection of a handrail around a conveyor that had been used by workers to ride from one point to another in the mine. The handrails forced them to walk down a previously unused passageway where they had to squeeze past an electrical junction box containing deadly defects, such as partly uninsulated wires, a lid that lacked effective means to keep it closed, and holes in the lid where the uninsulated wires had contacted it and caused a short circuit. Although a mandatory standard, 30 C.F.R. § 55.9-7, required the government inspectors to order a handrail or an emergency stopping device (in this mine, an emergency stopping device was impossible because it would have shut down the mine), the government inspectors ignored the mandatory standards set forth in 30 C.F.R. §§ 55.12-8, 55.12-13, 55.12-30, and 55.12-32 (1976) requiring elimination of the several electrical defects in the junction box. Furthermore, they ignored the mandatory instructions in their own Mine Enforcement and Safety Administration manual that "[a]n inspector shall consider his action during the inspection

and shall not create a dangerous situation in enforcing compliance with a standard." *Hylin, supra,* 715 F.2d at 1208-1209, 1213. The changes required to eliminate this fatal hazard were no less mandatory than the change that created it. No discretion was required.

Therefore, this case presents no issues in common with *United States v. S. A. Empresa De Viacao Aerea Rio Grandense (Varig), cert.* granted No. 82-1349 (May 16, 1983), or *United States v. United Scottish Insurance, cert.* granted No. 82-1350 (May 16, 1983). Neither *Varig* nor *United Scottish* involved any negligent enhancement of the risk, such as will establish liability in those states, including Illinois, that follow the Restatement (Second) of Torts, Section 324 A, subparagraph (a). Nor does this case involve any "discretionary function" such as the government contends was involved in *Varig* and *United Scottish.*

Only insofar as any issue is raised in *Varig* and *United Scottish* by the Justice Department's—most extreme—contention that, in conducting regulatory inspections, the government has absolute immunity from federal tort claims act liability, no matter what the character of its negligence, does this case have an issue in common with those cases. However, decision of *Varig* and *United Scottish* does not require reaching that issue, if indeed it is an issue; moreover, resolving it in the Department's favor would require overruling of *Dalehite v. United States,* 346 U.S. 15 (1953), if not also *Indian Towing Co. v. United States,* 350 U.S. 61 (1955).

The harshness and unsoundness of this most extreme contention is apparent from the Justice Department's own unwillingness to confront the consequences of it directly. Even while urging, in *Varig* and *United Scottish,* the abolition of liability for all regulatory inspection activity,

the Department is unwilling to say that *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973) (where an inspector ordered a fuel line modified in a way that caused it to become dangerous), is ill-founded. Instead, the Department tries to factually distinguish this case from Arney, (*cert.* pet. p.6, fn.4).

The distinction the Department of Justice draws is specious. It argues that, in *Arney*, the inspector ordered the fuel line modified in a way that made it dangerous; whereas, in this case, "The handrails that were installed pursuant to the Notice of Violation were not inherently dangerous and did not by themselves cause any injury." Obviously the handrails alone did not kill Hylin. They simply forced him to walk into an electrical death trap that the government inspectors were admittedly qualified to recognize but he was not.

Justice Department counsel are urging the same kind of tunnel vision as that exercised by the government mine inspectors who ordered the change resulting in Hylin's death. Such a contention is not compatible with the tort law of a single jurisdiction in the United States and well illustrates the Department's purpose to emasculate the federal tort claims act. The act was intended by Congress to impose on the federal government—with very few exceptions—the same legal responsibility for tortious misconduct that state law places on private individuals, not to place the government above the law and leave American citizens uncompensated for death or injury the government causes. The exceptions to the act are carefully and narrowly drafted to exclude only policy-making activities and a limited number of other specified activities for the misconduct of many of which there have existed other, if more limited, remedies. None of the exceptions

depends on artificial distinctions thoroughly repudiated under the law of every state, to which the act purportedly subjects the government on the same even-handed basis as other American citizens.

But the Department's efforts to distinguish this case from *Arney, supra,* and to put it under the umbrella of *Varig* and *United Scottish,* are not confined to comparing what the Courts of Appeal in these cases held and said. The Department goes outside the record presently before this Court to argue that:

> "The court of appeals stated that the inspectors 'observed [the junction box] and saw its dangerous condition' (App., *infra,* 3a; see also *id.* at 21a). However, the court did not cite any evidence to support this assertion, which is directly contrary to the findings of the district court (see *id.* at 39a). See page 6, *supra.* In fact the court of appeals' statement is not supported by anything in the record; there is no evidence that the inspectors either examined or were cognizant of the condition of the box at the time they issued the Notice of Violation with regard to the conveyor belt." *Cert.* pet. p.8, fn.3.

It is surprising that the Department of Justice seeks review in this Court of what essentially is a question of fact, even while stating: "We do not seek review here of the decision below that the district court clearly erred in finding that the inspectors' actions were not the proximate cause of respondent's injury [because] this determination is essentially factbound and presents no issue in common with any contention in *Varig* or *United Scottish.*" *Cert.* pet. p.11, fn.6. It is difficult to see how the question whether this case resembles *Arney* rather than *Varig* or *United Scottish* is less factbound than the issue of proximate cause. If the Seventh Circuit's version of

the facts is accepted rather than that of the Department, then, by the Department's own admission, the Seventh Circuit's imposition of liability for the creation of new dangers by actors who intermeddle, "may [as in *Arney*] be apt." *Cert.* pet. p.12.

However, since the Department of Justice has seen fit to disregard its own precept of not seeking review of a factbound issue, and has gone outside the record presently before this Court to argue the factbound issue, it appears appropriate for respondent to call the Court's attention to those portions of the record which fully support the Seventh Circuit's discussion of the facts. The Department of Justice notes that the government's mine inspectors conducted a safety inspection of the mine on February 10 and 11, 1977, *cert.* pet. 4, but distorts or omits several other important details.

First, the Department deceptively states that "the inspectors cited the mine owner for a violation of 30 C.F.R. pt. 55.9-7, the mandatory standard requiring that all unguarded conveyors be equipped with emergency stop devices . . ." but simply "*permitted*" the mine owner to abate the violation through the installation of a handrail because of the impracticality of an emergency stop device, *cert.* pet. 5. Actually, the regulation in question, 30 C.F.R. pt. 55.9-7, *required* a handrail or an emergency stop device, wherefor the government inspectors, in ordering an abatement, knowingly compelled the erection of a handrail because of the impossibility of using an emergency stop device. There was no discretion involved.

Second, the Department fails to mention that the government inspectors were present not only on February 10 and 11, 1977, but also on a follow-up inspection conducted on March 1, 1977, *Hylin, supra*, 715 F.2d at 1208.

Third, the Department erroneously states "It is not clear from the record how long the junction box had existed in this defective condition" that it was in when Hylin was electrocuted, *cert.* pet. p.4. The record is clear that the junction box was in the defective condition on and long prior to the February 10-11, 1977, inspection, although the exact length of the time preceding that inspection was not known (A1-A3).

Fourth, contrary to the Department's assertions, *cert.* pet. 8, fn.44, and p.9, fn.4, the evidence very clearly establishes that the government inspectors had seen and could not have mistaken the defective condition of the junction box. The deadly hazard that they themselves had created, by compelling the erection of handrails that forced workmen to walk past the junction box, was readily foreseeable to the government inspectors.

On February 10, 1974, Inspector Guthrie saw the junction box lid open and commented that it should be closed. But he issued no citation (A3-A6). Inspector Johnson testified at trial that he did not recall seeing the junction box but was impeached by his deposition testimony that he had seen the box but didn't notice the holes in it (A6-A9). Inspector Guthrie admitted that, during the February 10-11, 1977, inspection, he had to walk down the passage directly past the junction box, which partially obstructed his travel (A4-A6). Ronald Hollenbeck, the chief sub-regional inspector who was the superior of Guthrie and Johnson, testified that he could conceive of no reason why the violations of the junction box found in the post-accident investigation should not have been discovered before the accident by the MESA inspectors (A9). The District Court Judge himself stated, that the junction box was plainly there to be seen and he could hardly conceive of how anyone could fail to see it (A9-A10).

It should also be noted that the Department's *certiorari* petition does not accurately reflect other pertinent evidence on which the Seventh Circuit relied, including evidence not disputed. The Department devotes about 8 of the 12 pages of its petition to summarizing the Seventh Circuit opinion, although the opinion is of modest length and requires little if any explanation. Respondent respectfully urges that the opinion itself is a far more reliable guide than the Department's "statement" concerning what the Seventh Circuit held and said. The Department also unduly emphasizes, at *cert.* pet. p.7, the Seventh Circuit's reliance on the Ninth Circuit's decision in *United Scottish Insurance Co. v. United States*, 692 F.2d 1209 (1982), *cert.* granted, No. 82-1350 (May 16, 1983). Each of the Seventh Circuit's citations of *United Scottish*, (*Hylin, supra*, 715 F.2d at 1210, 1211, 1213, 1214), supports a well-established proposition for which numerous other decisions could easily have been cited. It was never cited as essential authority or suggested to involve similar issues. On the contrary, the Seventh Circuit specifically held that both *United Scottish* and *Varig* involved different issues, *Hylin, supra*, 715 F.2d at 1211, including fn.5.

REASONS AGAINST GRANTING THE PETITION

Unless this Court is prepared to hold that the federal tort claims act preserves "sovereign immunity" for the federal government when American citizens are killed or maimed through hazards created by the affirmative misconduct of government safety inspectors, then the Court's decisions in *Varig* and *United Scottish* will have no effect on the validity of the Seventh Circuit's decision in this case and there is no reason to grant the government's *certiorari* petition or hold it until *Varig* and *United Scottish* are decided.

Short of such an unmerciful interpretation of the act, the only other basis the government advances for relief is, in effect, for the Court to circumvent the foregoing question by overruling the factual determinations below or drawing tort law distinctions between commission and omission for the federal government that have been rejected for private individuals in the common law of every state in the nation. It is not clear that the government even desires that its petition should be granted for purposes of a full review on the merits. The implication of the government's request that its petition "should be held pending the Court's decision [in *Varig* and *United Scottish*]" is that, following the decisions in *Varig* and *United Scottish*, the Court should summarily remand this case to the Seventh Circuit for further proceedings consistent with the Court's *Varig* and *United Scottish* decisions. That would amount to a rebuke, if not a reversal, of the Seventh Circuit for its factual determinations, while depriving respondent of a full review on the merits. It

is respectfully submitted that a summary disposition based on the government's factual representations would be ill-founded and prejudicial to respondent and that neither a summary disposition nor a full review of the factual determinations could be of sufficient precedential importance to warrant granting or holding the government's *certiorari* petition for any purpose.

The federal tort claims act, 28 U.S.C. §§ 1346 (b) and 2674, is humane legislation designed to eliminate the injustices in the private compensation bill process and to place the federal government, so far as possible, on the same plane of responsibility—neither above nor below the law—as other Americans for tortious misconduct. It is shocking that the Department of Justice now urges the Court to directly or indirectly decide cases arising under the act as if it were designed to preserve impunity even for the fortunately rare instances where government inspectors, in the guise of protecting life and safety, become the agents of injury or death.

While other types of tort cases may have been of primary concern to Congress when the act was adopted, federal regulatory enforcement activities existed then, and long before then, and there is no basis for the suggestion that, in enacting the several carefully-worded exceptions to the act, which appear in 28 U.S.C. § 2680, Congress did not intend liability for tortious misconduct in the course of government inspections falling outside these exceptions. There is nothing in the act to support such a suggestion.

The gist of the Justice Department's position seems to be that, when the act imposes liability under circumstances where the government would be liable "if a private person," 28 U.S.C. § 1346 (b), or "to the same ex-

tent as a private individual," 28 U.S.C. § 2674, these phrases were intended to create another exception, cryptic and apart from those in 28 U.S.C. § 2680, and as broad as most of them combined, that eliminates the remedy for large segments of the government's business.

Both these phrases are missing verbs that must be implied for the phrases to have meaning. The Justice Department apparently is suggesting that "if a private person" should be viewed as saying "if [the United States *is*] a private person" rather than saying, as would seem to make more sense, "if [the United States *were*] a private person." As a matter of semantics, as well as of sound federal policy, liability should depend not on whether the government activity in question happens to be emulated in the private sector but on whether, if a private individual were to engage in the same activity, that individual would be liable. Of course the federal government exists only to do what private individuals and state governments are thought to be unable to do or do as well. Often the federal government preempts private or state action. To argue that the phrase "if a private person" was intended to paralyze the tort claims remedy whenever the government does what it mainly exists to do and private persons are unable to do, reflects an extremely dim view of Congress' purpose and methods in adopting this humane legislation.

But no matter how narrow a view is taken of the affirmative duty of a federal safety inspector to discover defects in a private workplace, no matter whether it is a primary or a secondary duty or whether it extends to the worker in the premises or only in some general sense to the public, one thing is clear: in no sense does any federal statute or regulation authorize or require a federal safety inspector to increase the danger of death or

injury or relieve a federal safety inspector of the common law duty generally embraced by the federal tort claims act to refrain from negligently inflicting harm on others through misconduct not authorized or required by any federal statute or regulation. Least persuasively of all can it be argued that an exception from tort claims act liability should be judicially recognized for affirmative misconduct of government safety inspectors violating the express requirements of the federal laws under which their inspections take place. The misconduct proved here was affirmative, deadly, and contrary to the non-discretionary requirements of the federal regulatory laws involved. Neither *Varig* nor *United Scottish* warrants a decision disturbing the Seventh Circuit's disposition of this controversy.

CONCLUSION

The government's petition for a writ of *certiorari* should promptly be denied, there being no reason to expect that the Court's decisions in *United States v. S. A. Empresa De Viacao Aerea Rio Grandense,* No. 82-1349, or *United States v. United Scottish Insurance,* No. 82-1350, should or will affect the outcome of this case.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM DIRECT EXAMINATION OF RISTOKRAT MINE MANAGER GEORGE McMAHON ON NOVEMBER 4, 1981

Q Can you tell us how long that box had been in place?

A I suspect from when the plant was built in about 1925.

Q Was it there from all the time you were there, from 1950 on?

A Yes.

Q I will ask you if you would look at this Exhibit 67. Does that appear to be the box involved?

A Yes, it does.

Q Do you see in this Exhibit 67 in the lid, a couple of holes there?

A Yes.

Q Do you have some knowledge, Mr. McMahon, of when and how those holes were formed?

A Yes. We had some problems with that box eight or ten years ago and as I remember it, the electrician, the man we had as a Head Maintenance Man had to wire and right now I can't remember whether it was our—we had Clair Harvey and Geno Rigari and I don't remember whether Clair had retired at that time or whether Geno had fixed it but there had to be some tape put on the wires at that point.

Q When you say about eight or ten years ago, was that some years prior to the accident to Donald Hylin?

A Yes, probably maybe 11 years now because that was—

Q All right. And were the holes in that lid formed at that time?

A Yes, there was holes in there.

Q Do you know of any other problems with that box in the meantime, between that incidence some eight or ten years before the accident to Hylin and the date of his accident in September, 1977?

A No, I don't.

Q And who was it that actually—I think you told us, was it an employee of Ristokrat that actually did the repair some eight or ten years before?

A Yes.

Q And after that repair was done, was the condition of the wires as they enter at the top of the box on the right, was that the same as shown in this Plaintiff's Exhibit 10?

A Yes, I presume so, yes.

Q Well do you know of any changes in that box from that time back when one of your maintenance men made the repair, to the time of the occurrence involving Donald Hylin?

A No.

Q So is the condition of the box as we see it here in this photograph, Exhibit 10, the box itself, the same condition as it was back eight or ten years ago right after the repair?

A I believe so, yes.

Q Now during the intervening years and between the time that somebody at the plant made that repair and the incident involving Donald Hylin, were there any MESA inspections of that conveyor room?

A Yes.

Q And were those inspections periodic at least once a year and several after that each year?

A I can't recall the number of times and I don't have that but they did come, I would say, twice a year, I think they were there.

Q During each of those inspections, were the holes in the box as you see them here today?

A They would have been there, yes.

Q During each of those inspections, were the wires in the condition that you see here in this Exhibit 10?

A Yes. Yes.

* * *

Q Do you know who it was that actually talked to you about the barricades or the lanyards?

A I think it was Mr. Guthrie that did that.

Q And did you understand that as a result of that citation, you had to put up a barricade?

A We had to do something, yes.

Q Now you mentioned a few moments ago something about an inspector saying something about a box. Did that occur during this inspection?

A Yes. Well, we were standing on the other side of that box and he said, "Well that should be—" He said, "That door should be closed on there."

Q Now when you say "we" who was standing there, first?

A Well, this was Mr. Guthrie.

Q That is what I want to get first. Was it you and Mr. Guthrie?

A Yes, right, sir.

Q Okay. Where were you standing?

A Well, it would be on the other side of that far side where the clay went down.

Q Pointing to Plaintiff's Exhibit 11?

A Yes.

Q And on the far side of the chute, that is in the back side of the picture, the far distance in the picture?

A Yes.

Q All right. And what were you standing on?

A Well, I believe you can see it better in the other picture.

Q Tell us where it was.

A We were just standing there where that incline starts up.

Q And what, actually, did Mr. Guthrie say to you?

A He says, "That lid on that box should be closed."

Q Did Mr. Guthrie then walk down and make any inspection of that box?

A No.

Q Did he write you any kind of a notice or citation about it?

A No, sir.

Q Did he tell you there was anything defective or dangerous in that box?

A No.

* * *

EXCERPT FROM ADVERSE EXAMINATION OF GOVERNMENT INSPECTOR JOHN GUTHRIE ON NOVEMBER 4, 1981

Q When you went in there, were you focusing your attention on the conveyor?

A Yes, sir, I was.

Q Did you know when you went in that room it was your obligation to inspect all other parts of that room?

A Yes, sir.

Q Did you make an inspection of all the other parts of that room?

A Yes, sir, I did.

Q Do you know where you entered the room from?

A Yes, sir. I came in from the grinding room area, I believe, sir, and the reason I am not real sure is it's pretty hazy, and I went back to the plant yesterday to refresh

my memory on that to try to bring—you know, as much memory back as possible, and it's my assumption that I came in from the grinding room area and was at the steel pulley end of the conveyor first.

In other words, the conveyor is at an incline, and I believe at this time that I probably went from the tail end of the conveyor up the ramp rather than around the steps and down the ramp.

Q I follow you. When you say the "tail end," you mean the end as we look at those Plaintiff's Exhibits 11 and 14, that would be facing us outside the picture here?

A Yes, yes.

Q All right. And then the conveyor, as you understood it, would turn and would run away from you toward the incline?

A Yes, and it was the distance out and then it would start going up.

Q Going out there yesterday help you?

A Yes, sir.

Q So it's your best recollection today that you came in through the grinding room to the tail end?

A Yes, sir.

Q What did you do? Did you go down the right side and make any kind of inspection?

A I started over to the—went through the doorway. There is a doorway back this way a ways, and I came through the doorway first and started checking the tail pulley. We are cognizant of head pulley and tail pulley guarding, and that was probably the first thing I looked at would be the tail pulley and making sure it was properly guarded, and I don't remember whether I saw anything in guarding this or not but evidently not because I didn't write anything. Had I seen something, I would have written it, but I continued on and I started to go up on the outside which would be to our right here.

Q On the right side of Exhibit 14 here?

A Yes, and I noticed the obstruction at that point and went back and went under some chutes and stuff looking at the conveyor.

Q What other things did you go around when you went under those chutes?

A Sir, in all honesty, I can't remember. Having looked at it yesterday, there were several things in there that one would have to duck or move out of the way of in order to make progress further. As of the inspection, the original inspection, it's very, very hazy in my mind, and I really can't remember from that exactly what—all the things, but looking at it from yesterday, there was the chute, there was no box there at the time I looked at it yesterday, but there was the imprint of the box so I assumed the box would have been in the road and would have been part of my obstruction, too.

* * *

EXCERPT FROM ADVERSE EXAMINATION OF GOVERNMENT SAFETY INSPECTOR DONALD JOHNSON ON NOVEMBER 4, 1981

Q Good morning, Mr. Johnson.

A Good morning.

Q I think as we left off yesterday, I think I had asked you whether or not you had seen the box out there at any time prior to the accident involving Donald Hylin and your answer is you had not?

A That's right.

Q Let me just ask you, referring to your deposition, do you remember that having been taken?

A Yes, sir.

Q I refer to Pages 79 and 112 and I will ask you if you remember this question and answer being given in 1979:

"Q Now you have indicated that you had been in the room during your inspections at times before Mr. Hylin died. Did you ever see the junction box there, to your recollection?

A Yes, sir.

Q Well, I take it if you looked at it, that you would have done so with a view toward performing your duties there, would that be a fair statement?

A Yes, sir."

Now on Page 112—

A Are you talking about the room in which Mr. Hylin was hurt?

Q Yes, sir. On Page 112:

"Q I'm speaking of February of 1977 on up to September of '77 or any time before February of '77.

A Well, I observed a box prior to the accident during my inspection and before that. It had the cover in a closed position.

Q Did it have any clips on it when you saw it?

A I don't remember, sir."

And it goes on and at that point we say:

"Q Did you ever see any holes in the lid?

A No, sir."

And you went on to say there that you did not see any holes in the lid of the junction box when you saw it at this time prior to the inspection after Donald Hylin's death. Is that what you recall, Mr. Johnson, that you saw the box before his death?

A It was a question that I answered previously, that of February?

Q Yes, sir.

A I never seen the box in February, sir. I might have seen it before but I never seen it in February.

Q If you saw it before February, it would have been on some inspection, would it not, that you had made out there, from the time that MESA started in 1972 and you started in '74 making those inspections?

A It would have happened then, yes.

Q In those years, it is your testimony that you looked at that box but you didn't see holes in it?

A That is the way I recollect it.

Q Now if you saw holes in that box, that would be a mandatory violation because it would be a partial cover and that wouldn't be satisfactory, is that right, sir?

A I would have to investigate it if I saw a hole in the box, to relate that maybe something was amiss. If the holes were there and it had a cover inside behind the cover, I would have to ask somebody to bring it to their attention and see if there was something wrong. I would dig into it or look into it.

Q Now let me ask you these questions then from your deposition again, Pages 118 and 119:

> "Q The presence of the junction box lid was the question. The presence of the junction box lid that has holes in it is a violation in and of itself of the standards, isn't it?
>
> A It is a violation in the fact it is not in proper order.
>
> Q It is a violation of MESA's Electrical Mandatory Standards, isn't it?
>
> A It is not in custom with good electrical wiring practices."

Then there is some colloquy and the question:

> "Q Don't MESA standards, without my taking the time to go over them and I will if need be, require that junction boxes and electrical connections be covered?

A Yes, sir.

Q And I assume that means a cover that doesn't have holes in it, doesn't it, because that is a partial cover?

A Yes, sir."

Does that help you to recall that a box with holes in it would be a mandatory violation?

A I follow that statement, yes.

* * *

EXCERPT FROM THE DEPOSITION (PLAINTIFF'S EXHIBIT A AT TRIAL) OF GOVERNMENT SUB-REGIONAL CHIEF RONALD HOLLENBECK ON MAY 15, 1979

Q Did you review the investigation report yourself?

A Yes.

Q Did you see any reason, sir, why the violations of mandatory standards that were found in the post accident investigation should not have been discovered before the accident happened by MESA's inspectors?

A Will you repeat that, please?

MR. DAVIDSON: Please read it.

(Whereupon said question was read back.)

THE WITNESS: No.

MR. DAVIDSON: Nothing further.

* * *

COLLOQUY BETWEEN PLAINTIFF'S COUNSEL AND THE COURT ON NOVEMBER 4, 1981

MR. PATTERSON: Your Honor, it is not agreed that it wasn't seen. It is not agreed it wasn't seen by this man. The box was there to be seen. As your Honor noted earlier in this case, we had testimony from Mr. McMahon

that it actually was seen in an open condition and I submit to the Court there is no way a man could go by there and not see that box.

THE COURT: Now wait a minute now. Then the nature of the case—I think with that statement, this case turns into something else. Do you mean to say it is the plaintiff's theory of the case that these inspectors saw the box—and what did they do?

MR. PATTERSON: That they ignored it, that they saw the box and they simply walked by it and paid no attention to it and they should have seen it.

THE COURT: All right. That is a difference of degree. They saw the box and ignored it.

MR. PATTERSON: Exactly.

THE COURT: Mr. Guthrie was under oath and he says he didn't see it. Mr. Beavers who testified under oath said he didn't see it. Mr. Stachowiak who testified under oath said he didn't see it.

I will be candid with you. I don't know how anybody could be there and not see that box.

MR. PATTERSON: Correct.

* * *

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No. 83-1818

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

In our petition we argued, inter alia, that the United States is not liable to respondent because her claim that her husband died due to the alleged negligence of a federal mine inspector was barred by the "discretionary function" exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a). We suggested that the petition be held pending the disposition of *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* No. 82-1349 (June 19, 1984), in which a similar issue had been presented, and then disposed of as appropriate in light of that decision. This Court has now decided *Varig Airlines* and unanimously held that the discretionary function exception bars all claims against the United States based on the efforts of the Federal Aviation Administration to regulate air safety through its inspection program. We submit that this holding is equally applicable

to the regulatory activities of federal mine inspectors. Accordingly, the judgment of the court of appeals should be vacated and the case remanded for reconsideration in light of *Varig Airlines*.[1]

The federal government's mine safety regulatory program is indistinguishable from the FAA's air safety program. As this Court explained in *Varig Airlines*, slip op. 6, under the Federal Aviation Act of 1958, the Secretary of Transportation has been delegated authority to establish safety standards and to develop a system of inspections, 49 U.S.C. 1421(a)(1) and (3), but the responsibility for compliance with the standards remains with the owner or operator of the aircraft. 49 U.S.C. 1421(b), 1425(a). Similarly, the Secretary of the Interior was delegated authority under the Federal Metal and Nonmetallic Mine Safety Act of 1969, Pub. L. No. 89-577, 80 Stat. 772 *et seq.*, to set "mandatory standards" for mine safety and to provide for health and safety inspections, which in 1977 were performed by the Mine Enforcement and Safety Administration (MESA).

---

[1]Respondent seeks to distinguish this case from *Varig Airlines* on the ground that she relied at trial on a different aspect of the good samaritan doctrine. Respondent emphasizes that the government was held liable here because it "actually worsened the risk of death and injury during its mine safety inspection," not because of "a mere failure to detect a risk" (Br. in Opp. 1; see also *id.* at 1 n.*, 11-12). But this Court in *Varig Airlines* expressly declined to rest its decision on the application of the good samaritan doctrine to the FAA's certification process. See slip op. 17 n.12. Rather, as the Seventh Circuit recently observed, *Varig Airlines* "was decided on the 'discretionary function' exception to the FTCA." *Arvanis* v. *Noslo Engineering Consultants, Inc.*, No. 83-1670 (July 31, 1984), slip op. 6 n.4.

Respondent has conceded (Br. in Opp. 3) that the discretionary function contention we made in *Varig Airlines* is controlling in this case. Respondent explained that with respect to our contention that the government, in conducting regulatory inspections, has "absolute immunity from federal tort claims act liability," this case does "have an issue in common with" *Varig Airlines*.

§ 8, 80 Stat. 775.[2] But the Mine Safety Act left no doubt that the mine owner retained "the primary responsibility to prevent the existence of [unhealthy and unsafe] conditions and practices in such mines." 30 U.S.C. (1976 ed.) 801(e). To implement this requirement, MESA's regulations imposed a duty on the employer to "establish a definite, effective, and continually functioning safety program and make every attempt to prevent accidents and increase safety." 30 C.F.R. 56.18-1 (1977). Also, "[r]egular safety inspections should be made by company officials or safety committees." 30 C.F.R. 56.18-2 (1977). Compare *Varig Airlines*, slip op. 8, 17. Thus, in both *Varig Airlines* and here, the federal government's role was solely to regulate compliance by private industry with federal safety standards.

Like the FAA (see *Varig Airlines*, slip op. 9, 18-22), MESA did not purport to guarantee mine safety; nor could it. With approximately 300 mine inspectors, MESA was responsible for overseeing health and safety at 11,600 active and 4,000 intermittently operated (seasonal or on demand) mines. In 1977, MESA conducted over 37,000 inspections. See *Interior Dep't Ann. Rep. to Congress* 5, 15 (1977). Compare *United States* v. *Varig Airlines*, slip op. 9 ("[w]ith fewer than 400 engineers, the FAA obviously cannot complete this elaborate compliance review process alone"). MESA's regulatory scheme was no more suitable to uncovering all safety defects than the FAA's. As the Secretary pointed out in his 1977 Annual Report to Congress (at 9):

---

[2]As we explained in the petition (Pet. 2 n.1) the Mine Safety Act was repealed after the accident in this case, but the regulatory system has remained essentially unchanged.

> Regulations and their enforcement alone cannot make a mine a safe place to work. Mining involves unavoidable and calculated risks * * *. It is most important that people (operators, supervisors, and miners) employed in mining be schooled in recognition and elimination of these hazards.

MESA's effort to "spot" violations of its safety standards during relatively brief inspections of mines was very similar to the FAA's inspection program; it was the quintessential governmental effort to encourage private industry to comply with the law. See Pet. 11-12. This Court in *Varig Airlines* held that "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of private individuals." Slip op. 15 (footnote omitted). Since respondent's claim arises directly out of MESA's activities as "regulator of private individuals," her claim is barred by 28 U.S.C. 2680(a).

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349 (June 19, 1984).

Respectfully submitted.

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Solicitor General

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Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT, DONNA HYLIN

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The Justice Department's "reply brief" is not a reply brief. It is a supplemental brief seeking reply brief status through a single footnote (Pet. Reply, Br. at 1 fn. 1) incomprehensibly stating that Respondent Hylin, in her brief at p. 3, had conceded that the Justice Department's discretionary function contention in the *Varig Airlines* case is controlling in this case.

Respondent Hylin contended exactly the opposite. On page 3, the very page cited in the Justice Department's footnote, Respondent contended that "no discretion was required" by the government mine inspectors, and that

"Nor does this case involve any discretionary function such as the government contends was involved in *Varig* and *United Scottish.*"

Respondent acknowledged "an issue in common" with *Varig* and *United Scottish* only insofar as the Justice Department had asked the Court to abolish federal tort claim act liability as to any and all federal regulatory activities, regardless of the character of conduct involved (Resp. br., p. 3). The Court has rejected that extreme and unwarranted contention by the Justice Department, leaving no issue in common between this case and *Varig* or *United Scottish.*

The Justice Department's reply brief is simply a post-*Varig* attempt to supplement a "discretionary function" contention to which it appropriately gave minimal attention before *Varig* was decided. The "discretionary function" issue, neither then or now, has merited serious consideration by the parties or the Court in this case.

Nothing beyond reference to Respondent's original brief (esp. Resp. br., pp. 2, 3, 6 and 7) would be warranted on the subject now, except that the Justice Department again, as in its *certiorari* petition, has gone outside the record to imply facts contradicted by the trial record. This time the Justice Department quotes employment and inspection statistics from the *Interior Dept. Ann. Rep. to Congress* 5, 15 (1977) in an effort to draw some analogy between the FAA's usage of scarce resources in airplane certification procedures and MESA's mine safety inspections (Gvt. reply brief at 3, 4).

Notwithstanding that the foregoing document is not in the trial record, that it was not attached to or furnished with the Justice Department's Reply Brief, and that Re-

spondent's counsel has been unable to find a copy of it, the trial record fully rebuts the Justice Department's attempted analogy.

The pretrial stipulation between the government and plaintiff Hylin at the liability trial of this case, included an *agreed statement of facts* containing the following paragraphs:

> Ristokrat, as a clay mine, was subject to the jurisdiction of the Mining Enforcement Safety Administration (MESA). It was MESA's function, under the authority of the Secretary of the Interior, to enforce the provisions of the Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Sec. 721, *et seq.*, as amended, including the promulgation and publication in the Federal Register of Mandatory Safety Standards required to be complied with by mining operators subject to MESA's jurisdicton. MESA's functions in carrying out the act included the inspection and investigation of mines and, on September 1, 1977, and prior thereto, these functions include the issuance of orders requiring mine operators to eliminate dangerous conditions or practices violating the mandatory safety standards, and invoking sanctions to enforce such orders.
>
> On February 10-11, 1977, MESA conducted what it calls a "regular inspection," and then subsequently conducted what it calls "spot inspections" on March 1, 1977, April 4, 1977, May 10, 1977, and July 25, 1977.
>
> A regular inspection is an initial inspection conducted at least once annually. A spot inspection is a follow-up inspection to determine whether violations cited in the regular inspection have been abated.

Going beyond the pretrial stipulation, the trial record demonstrates that MESA's mandatory procedures, dur-

ing the February 10-11 regular safety inspection, required the federal mine inspectors Johnson and Guthrie to inspect every aspect of the operators of the plant for safety and health hazards, including the electrical junction box (Testimony of inspectors Johnson and Guthrie, Trial Transcript 223, 225, 230, 254, and 260-262).

The Justice Department's reply brief is little more than an attempt *dehors* the record to repudiate the agreed statement of facts to which it stipulated at trial and the sworn testimony of two federal mine inspectors.

The mine safety inspection, during which the federal inspectors in this case helped create a death trap, was a *mandatory*, regular, annual inspection. In no sense was it the selective kind of inspection conducted at the discretion of the agency or an inspector, such as in *Varig*. Furthermore, the misconduct alleged and proved was the failure of the federal mine inspector to enforce several *mandatory* safety standards, ones they had no discretion not to enforce, and that, if enforced, would have fully protected plaintiff's decedent against being electrocuted by a defective electrical junction box. The federal inspectors had foreseeably forced mineworkers to come into contact with the junction box hazards because they had shut down another passageway by enforcing a *mandatory* handrail safety standard. In doing so, they violated another mandatory requirement that they not create hazards through their safety inspections. (See Seventh Circuit op., *Hylin v. United States*, 715 F.2d 1206, at 1208-1209, 1213, 1216; see Resp. br. at 2-4, 6-7). Ronald Hollenbeck, the chief sub-regional inspector who was the superior of Guthrie and Johnson, testified that he could conceive of no reason why the violations of the junction box found in the post-

accident investigation should not have been discovered before the accident by the MESA inspectors (Resp. br. App. p. 9).

The FAA regulatory scheme discussed in the *Varig Airlines* and *United Scottish* opinions, *United States v. S. A. Empresa De Viacao Aerea Rio Grandense,* 81 L.Ed.2d 660 (1984), bears no resemblance to the MESA inspections involved in this case. The FAA system placed the burden on aircraft manufacturers to do all necessary testing to achieve airworthiness certification from the FAA, and the FAA engaged in "spot check" inspections according to its discretionary judgment as to the confidence that could justifiably be reposed in the testing of particular aircraft manufacturers in light of their reputation and experience. The Court's opinion emphasized the scarcity of the FAA's resources to evaluate sophisticated aircraft design and to conduct conformity inspections. The Court also noted that the FAA had done no inspections of the prototypes of the aircraft involved in the *Varig* and *United Scottish* cases, that the plaintiffs in those cases were in fact challenging the FAA's discretionary judgment not to do any, and that the discretionary function exception to the FTCA was intended to prevent judicial second-guessing of policy decisions based on social, economic, and political grounds, through the medium of a tort action.

In this case, however, it is the Justice Department doing the second guessing: of MESA, MESA's inspectors, and the Justice Department's own trial counsel, because it was undisputed here at trial that there was an inspection, it was mandatory, a mandatory corrective order was not issued, and a mandatory prohibition against creating hazards was violated.

As the Seventh Circuit stated:

> "If the nearly automatic issuance of the citation here were considered to be a discretionary function, it would be hard to imagine any governmental activity which would be actionable under the FTCA." *Hylin v. United States*, 715 F.2d 1206, at 1214 (7th Cir. 1983).

Respectfully submitted,

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